Arlington Masonry Supply, Inc. *and* Local 247, International Brotherhood of Teamsters, AFL–CIO, Petitioner. Case 7–RC–22225

July 21, 2003

DECISION AND DIRECTION

BY CHAIRMAN BATTISTA AND MEMBERS SCHAUMBER AND WALSH

The National Labor Relations Board, by a three-member panel, has considered objections to, and determinative challenges in, an election held May 23, 2002,[1] and the hearing officer's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 4 for and 2 against the Petitioner, with 6 challenged ballots, a sufficient number to affect the results of the election.

The Board has reviewed the record in light of the exceptions[2] and brief, and has adopted the hearing officer's findings and recommendations, only to the extent consistent with this Decision and Direction.

We agree with the hearing officer, for the reasons stated in her report, that the Petitioner's challenge to the ballots of Lawrence Smith and Robert Hanson[3] should be sustained, and that the Employer's objections to the election should be overruled. However, we find, contrary to the hearing officer's recommendations, that the challenge to the ballot of Dana Justice should be sustained, and the challenge to the ballot of Michael Yax should be overruled.

The Employer distributes building materials such as blocks, bricks, and steel. The Petitioner seeks to represent a unit of the Employer's full-time and part-time maintenance employees, yard employees, hi-lo operators, material drivers-stake and dump, material drivers-semi double bottom, front end operator, and mechanics. The parties' Stipulated Election Agreement specifically excludes from the unit supervisors and certain other classes of employees not relevant here.

I. DANA JUSTICE'S SUPERVISORY STATUS

The Board agent challenged the ballot of Dana Justice because his name did not appear on the *Excelsior* list. The Petitioner contends that Justice is a lead mechanic who should be included in the unit. The Employer, however, argues that Justice is a supervisor under the Act, and should be excluded from the unit.

Justice has the title of "maintenance supervisor" of the Employer's vehicle maintenance garage. He was promoted to that position in 2001, after 18 years of service with the Employer.[4]

The Employer's general manager, Michael Cox, testified that he visits the maintenance garage only about three times a week for about 5 minutes a visit. Thus, as maintenance supervisor, Justice is responsible for all the work going in and out of the maintenance garage. There is one mechanic, Wayne Pardon, working at the garage.[5] Justice prioritizes all the work that needs to be done in the garage and assigns Pardon to work on specific trucks, directs Pardon as to what type of maintenance needs to be done to the trucks that come into the garage, and inspects Pardon's work. Cox testified that Justice assigns all of the maintenance work at his discretion and that Cox has no input in Justice's assignment of duties.[6] Justice creates the employee work schedule; approves time

[1] Hereinafter all dates are in 2002 unless otherwise noted.

[2] In the absence of exceptions, we adopt pro forma the hearing officer's recommendations that the challenges to the ballots of Lee Roy Cox and Brandon Faircloth be overruled.

[3] In adopting the hearing officer's recommendation that the challenge to Hanson's ballot be sustained, we emphasize that the record evidence is insufficient to warrant a finding that he was eligible to vote as a dual-function employee. Thus, the record contains only estimates of the amount of time Hanson spent performing unit work, and these estimates ranged from a low of 15 percent to a high of 25 percent. Under Board precedent, an employee spending 15 percent of his time performing unit work is not included in the unit. See, e.g., *Continental Cablevision*, 298 NLRB 973, 974–975 (1990) (excluding employees spending approximately 17 percent of their time performing unit work). Although in some weeks Hanson may have spent up to 25 percent of his time performing unit work, there is no evidence to show how often this occurred. In sum, on this record, we cannot conclude that Hanson "regularly perform[s] duties similar to those performed by unit employees for sufficient periods of time to demonstrate that [he has] a substantial interest in working conditions of the unit." *Martin Enterprises*, 325 NLRB 714, 715 (1998).

Chairman Battista and Member Schaumber agree with the hearing officer that the record fails to establish that Smith and Hanson were eligible to vote as dual function employees. However, Chairman Battista and Member Schaumber do not rely on *Oxford Chemicals*, 286 NLRB 187 (1987), cited by the hearing officer, to the extent that it holds that if it can be shown that an employee regularly performs unit work for a sufficient period, it is inappropriate to evaluate other community of interest factors in determining whether that employee should be included in the unit.

Member Walsh joins his colleagues in adopting the hearing officer's finding that Smith and Hanson were not eligible to vote as dual function employees. However, Member Walsh does not join his colleagues' dicta in which they distance themselves from *Oxford Chemicals*, supra. That case correctly holds that if a dual-function employee regularly performs a substantial amount of unit work, he is eligible to vote, and "it is both unnecessary and inappropriate to evaluate other aspects of the dual function employee's terms and conditions of employment in a kind of second tier community-of-interest analysis." Id. at 188. Accord, *Continental Cablevision*, supra, 298 NLRB at 973. Member Walsh adheres to this well-established Board precedent.

[4] Justice did not receive a raise when promoted to this position.

[5] Another mechanic also works in the garage, but he is not on the Employer's payroll. There is no evidence that Justice directs his work.

[6] Cox testified that Justice "probably" spends a lot of time actually engaging in maintenance work on the vehicles.

off, which is noted on a calendar in the garage with Justice's initials on it; and assigns hours of work, including overtime. As Justice's supervisor, Cox testified that he does not even approve Justice's time off or his schedule. Cox testified that Justice may issue written or verbal reprimands without Cox's consent.[7] Cox also noted that Justice may recommend suspension or discharge of an employee, and that even though Justice has never done so, Cox would "most likely" follow the recommendation. Additionally, Justice orders parts for the garage and approves invoices. Cox testified that Justice exercises independent judgment in performing all of the aforementioned tasks.[8]

The hearing officer concluded that Justice did not have supervisory authority within the meaning of Section 2(11) of the Act. The hearing officer noted that as a "maintenance supervisor," Justice did not have the authority to hire, fire, transfer, suspend, lay-off, promote, reward, or discipline employees. She found that "any authority to assign or direct the work of other employees is in the nature of an experienced employee lending his or her expertise to less experienced employees and not that which requires true supervisory prerogatives or the 'use of independent judgment.'" The hearing officer also discounted Justice's authority to reprimand or discipline employees because there was no evidence that he had ever exercised that authority. According to the hearing officer, "Justice appears at most to act as a conduit of information without exercising significant discretion."

As noted above, we disagree with the hearing officer's conclusion that Justice is not a supervisor. Section 2(11) of the Act defines the term "supervisor" as "any individual having *authority*, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing, the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment." (Emphasis added.) An individual need possess only one of the enumerated indicia of authority in order to be encompassed by Section 2(11), as long as the exercise of such authority is carried out in the interest of the employer, and requires the exercise of independent judgment. *California Beverage Co.*, 283 NLRB 328 (1987). "[T]he employee is [not] required to regularly and routinely exercise the powers set forth in the statute. It is the existence of the power which determines whether or not an employee is a supervisor." *NLRB v. Roselon Southern, Inc*., 382 F.2d 245, 247 (6th Cir. 1967). However, only individuals with "genuine management prerogatives" should be considered supervisors, as opposed to "straw bosses, leadmen . . . and other minor supervisory employees." *Chicago Metallic Corp.*, 273 NLRB 1677, 1688 (1985), enfd. in relevant part 794 F.2d 527 (9th Cir. 1986). Therefore, an individual who exercises some "supervisory authority" only in a routine, clerical, or perfunctory manner will not be found to be a supervisor. *Bowne of Houston, Inc.*, 280 NLRB 1222, 1223 (1986). Further, the burden of proving that an individual is a supervisor is on the party alleging such status. *NLRB v. Kentucky River Community Care*, 532 U.S. 706, 712 (2001).

Applying these principles to the facts of this case, we find that the Employer has met its burden of proving that Dana Justice possesses supervisory authority within the meaning of Section 2(11). It is undisputed that Justice prioritizes all the maintenance work that needs to be performed on vehicles in the Employer's garage. On a daily basis, Justice assigns specific jobs to Pardon, while reserving other duties for himself. In addition, the record shows that Justice's discretion in making these assignments is in no way limited or circumscribed by the Employer. Thus, Cox testified that although he is Justice's supervisor, Cox has absolutely no input as to the manner in which Justice carries out his daily responsibilities. Justice "is the only one" making work-assignment decisions because Cox is "not there to do it. It's Dana's garage."[9] Accordingly, we conclude that the record establishes that Justice uses independent judgment in assigning work—a primary indicia of supervisory authority. See *Oscar Ewing, Inc.*, 124 NLRB 941 (1959) (person in charge of employer's garage was found to be a supervisor because he, inter alia, assigned work, even though he spent 90 percent of his time working as a mechanic); *Walker-Roemer Dairies, Inc.*, 186 NLRB 430 (1970) (lead mechanic, who inspected vehicles for repairs, assigned work, told mechanics "which way to do it," and could have required that it be redone, was found a supervisor under the Act). We also rely upon Justice's author-

[7] Cox testified that he was not aware of any reprimands that Justice may have issued since he began his tenure as maintenance supervisor.

[8] Neither Justice nor Pardon testified at the hearing.

[9] In *Kentucky River*, supra, the Supreme Court rejected the rationale relied on by the hearing officer here that judgment involving assignment and direction of work which is based on technical skill and experience does not constitute "independent judgment" within the meaning of Sec. 2 (11). 532 U.S. at 717.

Hydro Conduit Corp., 254 NLRB 433, 436–437 (1981), relied on by the hearing officer is distinguishable. In that case, the evidence "fail[ed] to show that [the individual] in question exercised independent judgment in performing [supervisory] functions." Id. at 437.

ity to create the work schedule, grant time off and assign hours and overtime.[10]

For these reasons, we sustain the challenge to Justice's ballot.[11]

II. MICHAEL YAX'S PART-TIME STATUS

Michael Yax began working as a part-time driver for the Employer on April 3, 10 days prior to the eligibility date for the election.[12] The Petitioner, however, challenged Yax's ballot, contending that because he was a casual employee, Yax should not have been included in the unit. The Employer, however, argued that Yax was a regular part-time employee who should be included in the unit. The hearing officer agreed with the Petitioner and recommended that the challenge to Yax's ballot be sustained.

Yax is the only part-time driver employed at the Employer's facility at the present time. He earns the same hourly rate as the full-time drivers when he is working, and performs the same duties as the other drivers. He drives one of the two brick trucks or the dump truck, as needed. Yax is not a regularly scheduled employee. Cox testified that there may be days when Yax calls into work to see if anything is available, and he can also turn down work if called by the Employer to come in.

It is the Employer's policy not to provide benefits to any part-time employees, and therefore Yax does not have any of the benefits that the full-time drivers enjoy. However, Cox did state that Yax enjoys the "same wages, benefits, and conditions of employment" as other part-time employees have in the past.

According to the hearing officer, Yax could not be considered a regular part-time employee because: (1) he was not eligible to vote as a part-time employee under the *Davison-Paxon* test[13] because he began work only 3 days prior to the payroll period designated for eligibility purposes,[14] and (2) he exhibited more signs of a casual employee than a regular part-time employee. The hearing officer determined that Yax worked infrequently in April and May, and has worked less since the election. In addition, he is able to decline work and he does not receive benefits. Because of Yax's "sporadic employment," she found that he did "not share a sufficient community of interest with the Employer's other employees to be included in the bargaining unit." We disagree with the hearing officer's recommendation and find that Yax is a regular part-time employee.

The test to determine whether one is a regular part-time employee versus a casual employee "takes into consideration such factors as regularity and continuity of employment, tenure of employment, similarity of work duties, and similarity of wages, benefits, and other working conditions." *Muncie Newspapers, Inc.*, 246 NLRB 1088, 1089 (1979). "In short, the individual's relationship to the job must be examined to determine whether the employee performs unit work with sufficient regularity to demonstrate a community of interest with remaining employees in the bargaining unit." *Pat's Blue Ribbons*, 286 NLRB 918 (1987).

The standard frequently used by the Board to determine the regularity of part-time employment is to examine whether the employee worked an average of 4 or more hours a week in the quarter preceding the eligibility date. See *Davison-Paxon*, supra.

In cases in which an employee is hired during the quarter preceding the eligibility date, however, the Board has sometimes calculated the employee's hours from the hire date up until the *election date*, as opposed to the eligibility date. For example, in *Stockham Valve & Fittings, Inc.*, 222 NLRB 217 (1976), the Board found that

[10] We find it unnecessary to rely upon Justice's alleged authority to issue reprimands and recommend suspension and discharge.

Contrary to the view of our dissenting colleague set forth in fn. 11 below, we find that Cox's testimony is not conclusory and that the cases cited by the dissent are therefore distinguishable on their facts. Cox's uncontradicted testimony clearly and succinctly describes how Justice has the authority and the unbridled discretion to make work-assignment decisions in the Employer's garage. It is only necessary to show that an individual possesses supervisory authority within the meaning of the Act; it is not essential to show that the authority was actually exercised. *Ohio Power Co. v. NLRB*, 176 F.2d 385, 388 (6th Cir. 1949) (Sec. 2(11) "does not require the exercise of the power described . . . . It is the existence of the power which determines the classification"), cert. denied 338 U.S. 899 (1949). Cox's testimony is sufficient in this case to establish that Justice possessed the authority to assign work utilizing independent judgment.

[11] Contrary to his colleagues, Member Walsh finds that the Employer has not provided sufficient evidence to prove that Justice is a supervisor under the Act. Member Walsh notes that Cox's testimony was purely conclusionary and failed to offer any specific instances or examples of Justice's exercise of independent judgment. See *Chevron Shipping Co.*, 317 NLRB 379 fn. 6 (1995) (citing *Sears, Roebuck & Co.*, 304 NLRB 193 (1991) ("conclusionary statements made by witnesses in their testimony, without supporting evidence, do[] not establish supervisory authority")). In light of the conclusionary nature of Cox's testimony, Member Walsh finds that the Employer has not met its burden of proving that Cox possessed supervisory authority within the meaning of Sec. 2(11) of the Act. Therefore, Member Walsh would adopt the hearing officer's recommendation and overrule the challenge to Justice's ballot.

[12] The ending date of the payroll period for eligibility in the election was April 13.

[13] Under *Davison-Paxon Co.*, 185 NLRB 21, 24 (1970), "any contingent or extra employee who regularly averages 4 hours or more per week for the last quarter prior to the eligibility date has a sufficient community of interest for inclusion in the unit and may vote in the election."

[14] In fact, Yax began work on April 3, 10 days before the April 13 end of the eligibility payroll period.

two part-time employees, who began working 1 month prior to the election, individually worked sufficient hours to be eligible to vote in the election. The Board calculated their work hours from their *hire date up until the election date*. Under that calculation, they each worked at least 4 hours per week on average, enough to make them eligible to vote in the election.

Because the period of time between Yax's hire date and the eligibility date for the election was so brief, a period of 10 days, we think it appropriate, pursuant to *Stockham Valve & Fittings*, supra, to consider Yax's hours from his hire date up until the date of the election in determining whether he is eligible to vote. From April 3, Yax's date of hire, to May 23, the date of the election, Yax worked over 66 hours, for an average of slightly in excess of 9 hours per week.[15] We find this to be sufficient to warrant Yax's inclusion in the unit under *Stockham Valve*.

Furthermore, when working, Yax receives the same pay, is under the same supervision and works under the same conditions as other drivers. The fact that Yax can turn down work or is unscheduled is not determinative. See *Tri-State Transportation Co., Inc.*, 289 NLRB 356, 357 (1988) (Board held that an employee's ability to decline work and be employed elsewhere is not determinative of employment status); see also *Mercury Distribution Carriers, Inc.*, 312 NLRB 840 (1993) (the fact that a part-time employee does not call in to work every day to find out if work is available, does not require his exclusion from the unit).

For the reasons set forth above, we conclude that Yax is a regular part-time employee under the Act and should be included in the unit. Accordingly, we overrule the challenge to Yax's ballot and shall direct that it be opened and counted.

DIRECTION

IT IS DIRECTED that the Regional Director shall, within 14 days from the date of this Decision and Direction, open and count the ballots of Lee Roy Cox, Brandon Faircloth, and Michael Yax, and prepare and serve on the parties a revised tally of ballots, and issue the appropriate certification.

[15] Yax worked the following hours: April 3 to 6–14.17 hours; April 22 to 27–24.28 hours; April 29 to May 4–18.68 hours; and May 6 to 11–9.09 hours. Yax's hourly total between his hire date and election date is 66.22 hours, which gives him an average of more than 9 hours per week over the 7-week period between his hire date and the election date.

The hearing officer erred in relying on Yax's work history *after* the election. It is well established that the Board does not "determine voter eligibility on the basis of after-the-fact considerations." *Georgia Pacific Corp.*, 201 NLRB 831, 832 (1973).